UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LONG BEACH MEMORIAL MEDICAL CENTER D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	)	Case No. 18-1125 NLRB Case No. 21-CA-157007

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and 29 U.S.C. § 160(f), Long Beach Memorial Medical Center d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children's and Women's Hospital Long Beach (formerly known as Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach), which hereinafter will be correctly named and referred to as "Petitioner," hereby petitions the Court for review of the entirety of the Decision and Order of the National Labor Relations Board entered on April 20, 2018, in Case No. 21-CA-157007, reported at 366 NLRB No. 66 (April 20, 2018), a copy of which is attached as **Exhibit A**.

DATED: May 9, 2018

Respectfully submitted,

By: _____

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EXHIBIT A

Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach *and* California Nurses Association/National Nurses United (CNA/NNU). Case 21–CA–157007

April 20, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On August 31, 2016, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The General Counsel filed exceptions, a supporting brief, an answering brief to the Respondent's cross-exceptions, and a reply brief. The Charging Party filed exceptions, a supporting brief, and an answering brief to the Respondent's cross-exceptions. The Respondent filed cross-exceptions, a supporting brief, an answering brief, and a reply brief to the General Counsel's and Charging Party's answering briefs. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

Facts

The Respondent, Long Beach Memorial Medical Center, Inc., is an independent, non-profit subsidiary of Memorial Health Services (MHS), which does business as MemorialCare. The Respondent operates two licensed hospitals in an urban area of Long Beach, California, employing approximately 6000 employees, including over 2100 registered nurses represented by the Charging Party Union. To help maintain safety and security, the Respondent issues identification badges to all its staff, who are required to wear them visibly at all times while on hospital premises. Each badge includes a photograph of the employee, his or her name and job title, and electronic coding that provides the employee with access to authorized areas of the hospital.

The Respondent also requires that all direct care providers wear standard hospital uniforms. Registered nurses (RNs) must wear navy blue scrubs provided by the Respondent with the MHS name and logo and their RN discipline embroidered on the upper left side of the scrub top. RNs must either affix their identification badge directly to their uniform, detaching it each time it must be inspected or swiped, or attach it to a retractable string pulley connected to a badge reel. Since March 2014, the Respondent has maintained a "Dress Code and Grooming Standards" policy (Policy #318), which requires, in relevant part, that "[o]nly MHS approved pins, badges, and professional certifications may be worn." Since October 2014, the Respondent has also maintained an "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy (PC-261.02), which states, in relevant part, that "[b]adge reels may only be branded with MemorialCare approved logos or text." Thus, PC-261.02 prohibits employees from wearing badge reels branded with union insignia.

Discussion

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) by maintaining Policy #318's overly broad prohibition of non-approved pins and badges. Policy #318 is presumptively invalid because it is not limited to direct patient care areas of the Respondent's facility, and the Respondent failed to show special circumstances warranting the restriction. See *Healthbridge Mgmt. LLC*, 360 NLRB 937, 938 (2014), enfd. 798 F.3d 1059 (D.C. Cir. 2015).[2] However, we reverse the judge and find that the badge reel provision in PC-261.02 is unlawful because it applies to all areas of the hospital including non–patient care areas, and the Respondent has not demonstrated special circumstances justifying such an absolute prohibition on the display of union insignia on employee badge reels.

The judge found that the badge reel rule only applied in immediate patient care areas and was therefore presumptively lawful. He reasoned that PC-261.02 "is expressly limited to direct patient care providers" and its stated "purpose is to assist patients in easily identifying their direct patient care providers and to prevent hospital acquired infections." He further noted that other provisions of the policy also reference patient care or patient care areas. Our dissenting colleague endorses the judge's analysis, but in light of Board and judicial precedent, we do not.

[1] We shall modify the judge's recommended Order to include the Board's standard remedial language for the violations found, and we shall substitute a new notice to conform to the language in the Order as modified.

[2] In affirming the judge's findings with regard to Policy #318, we do not pass on whether the prohibition at issue would be lawful if it were limited to attaching non-approved pins and badges to the employee identification badges.

It is well established that employees have a protected right to wear union insignia at work in the absence of special circumstances. See *George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978); *The Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enfd. 511 F.2d 527 (6th Cir. 1975); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In healthcare facilities, the Board and the courts have modified this general rule due to concerns about the possibility of disruption to patient care. Restrictions on wearing union insignia in immediate patient care areas are presumptively valid. See *NLRB v. Baptist Hospital. Inc.*, 442 U.S. 773, 781 (1979). However, following the general rule, restrictions on wearing union insignia in non–patient care areas are presumptively invalid and violate the Act unless the employer establishes special circumstances justifying its action. See *Casa San Miguel*, 320 NLRB 534, 540 (1995).

As noted above, the badge reel provision of PC-261.02 states that "[b]adge reels may only be branded with MemorialCare approved logos or text." On its face, this requirement applies in all areas of the hospital, including non–patient care areas. Contrary to the judge and our dissenting colleague, neither the language of other provisions within PC-261.02 nor the stated purpose of that policy establishes that it is limited to immediate patient care areas. The fact that the rule may only apply to "direct patient care *providers*" (emphasis added) does not establish that it only applies in immediate patient care *areas*. See *George J. London Memorial Hospital*, 238 NLRB at 708 (policy prohibiting insignia other than "of a professional nature" unlawful because, on its face, policy applies outside immediate patient care areas). Direct patient care providers necessarily move throughout the hospital and spend time in non-patient care areas. For instance, policy 1 of PC-261.02 acknowledges that direct care providers are at the hospital for reasons other than providing direct patient care, such as for education and meetings. In addition, nothing in the rule precludes the Respondent from applying it to non-patient care areas, notwithstanding its stated purposes of allowing patients to identify their direct care providers and preventing infection. The fact that other provisions of PC-261.02 explicitly state they only apply in immediate patient care areas does not alter this analysis.[3] To the contrary, those provisions' explicit limitation to patient care areas further suggests that the badge reel rule, which contains no similar language, is not so limited.[4] At the very least, this language creates an ambiguity about the scope of the policy, which must be construed against the Respondent as the drafter. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Absent special circumstances, then, the badge reel provision is unlawful.[5]

Within the healthcare setting, the Board will find special circumstances where an insignia restriction is "necessary to avoid disruption of healthcare operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). The Board has found special circumstances justifying proscription of union insignia and apparel when their display may "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. *Communications Workers of America, Local 13000 v. NLRB*, 99 Fed.Appx. 233 (D.C. Cir. 2004). However, "a rule that curtails employees' Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances." *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015), enfd. 826 F.3d 558 (1st Cir. 2016); see also *W San Diego*, 348 NLRB 372, 373–374 (2006) (special circumstances that justified employer's ban on buttons worn in public areas did not justify a ban on buttons worn in nonpublic areas).

Here, the Respondent has presented no evidence showing that employees in any way disrupted healthcare operations or disturbed patients by wearing badge reels branded with union insignia. The union-branded badge

[3] The judge cited PC-261.02's reference to the Respondent's "bare below the elbows" approach required in all patient care areas and policy 4 of PC-261.02, which states: "Hair (if below the shoulder) is to be tied back or pulled up to prevent any 'swing' into the patient area during care." The judge also cited policy 1, which allows employees to wear business casual clothing in addition to "MHS logo" attire when coming to the hospital for education or meetings, but policy 1 does not mention—much less narrow the scope of—the badge reel provision.

[4] Citing the same factors discussed above, our dissenting colleague argues that the badge reel policy should be read to apply only in immediate patient care areas. As we have explained, there is no merit to this view. Our colleague's suggestion that the Respondent's enforcement of the policy only with respect to immediate patient care areas supports his position is similarly misplaced. See *London Memorial Hospital*, supra (hospital's overbroad rule unlawful despite evidence it had only been enforced in immediate patient care areas).

[5] Our dissenting colleague argues that PC-261.02's stated scope "demonstrates that it was promulgated not to restrict employees' rights but to protect its patients" and would reasonably be read accordingly. But this argument gives too little weight to the broad language of the badge reel provision. And, of course, the Board need not find discriminatory motive in order to conclude that the policy is unlawful. Rather, the question is whether the policy as written applies outside immediate patient-care areas—which we find it does—and, if so, whether the Respondent demonstrated special circumstances, which we conclude it has not.

reels are the same size and shape as the Respondent's and similarly contain only a logo. Rather than point to any evidence of a disturbance or disruption, the Respondent, relying principally on *W San Diego*, supra, argues that PC-261.02's badge reel provision is justified because the Respondent's "business objective was to provide a standardized, easily-identifiable, customized, consistent and professional look in accordance with its business strategy of providing quality patient[] care." Contrary to the employer in *W San Diego*, the Respondent presented no evidence that its rule prohibiting union badge reels in public, non-direct patient care areas is necessary to create a unique experience distinct from its competitors. See *Boch Honda*, supra, slip op. at 2 & fn. 6. While the Respondent does require unit employees to wear a standardized uniform, a uniform requirement alone is not a special circumstance justifying a union insignia prohibition. *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007) ("The Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia. Nor is the requirement that employees wear a uniform a special circumstance justifying a button prohibition.") (internal citations omitted).[6]

Furthermore, the badge reel provision is not "narrowly tailored" to address the Respondent's purported concerns of providing a uniformed image of top-quality patient care. See *Boch Honda*, supra, slip op. at 3. In *Casa San Miguel*, the Board recognized that special circumstances justified a nursing home's prohibiting a nursing assistant from wearing a smock with a union slogan and emblem printed on it outside of patient care areas where it was not "practical or possible" for the employee to change out of the smock each time the employee entered a patient care area. 320 NLRB at 540. The badge reels at issue here, in contrast, are readily detachable from employees' uniforms, and nothing prevents employees from removing a union-branded badge reel and affixing the identification badge directly to the employee's uniform when entering patient care areas. See *Enloe Medical Center*, 345 NLRB 874, 876 (2005) ("That employees might find it cumbersome to remove and later put back on their badges when moving in and out of patient care areas—and might even ultimately find it impractical to do so—does not justify the Respondent's effectively deciding this for them by flatly prohibiting employees from wearing the union badges in both patient-care and nonpatient-care areas."). Accordingly, even though it would be presumptively lawful if the Respondent had restricted it solely to direct patient care areas, the Respondent's ban on employees wearing union insignia, including on their badge reels, in other areas of the hospital is unlawful.

For these reasons, we reverse the judge and find that the Respondent violated Section 8(a)(1) by maintaining PC-261.02's badge reel policy.[7]

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law:

1. Respondent has violated Section 8(a)(1) and 2(6) and (7) of the Act by maintaining a provision in the Memorial Health Services (MHS) "Dress Code and Grooming Standards" policy, applicable to all employees, including employees in non–patient care areas, that states, "Only MHS approved pins, badges, and professional certifications may be worn."

2. Respondent has violated Section 8(a)(1) and 2(6) and (7) of the Act by maintaining a provision in the MHS "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy, applicable to all employees, including employees in non–patient care areas, that states, "Badge reels may only be branded with MemorialCare approved logos or text."

3. Respondent has not otherwise violated the Act as alleged in the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach, Long Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad provision of the "Dress Code and Grooming Standards" policy that prohibits all employees, including employees in non–patient care areas, from wearing pins, badges, and professional certifications that have not been approved by Memorial Health Services (MHS).

(b) Maintaining an overly broad provision of the "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy that prohibits all employees, including employees in non–patient care areas,

[6] Our dissenting colleague therefore errs when he contends that the Respondent's "standardized uniform rules" alone establish special circumstances.

[7] In reversing the judge's dismissal, and finding PC-261.02's badge reel provision facially unlawful, we need not and do not pass on whether the provision was disparately enforced in violation of Sec. 8(a)(1). Such a violation would not materially affect the remedy, given our finding that the Respondent violated Sec. 8(a)(1) by maintaining the badge reel provision.

from wearing badge reels that are not branded with MemorialCare approved logos or text.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overly broad provision of the "Dress Code and Grooming Standards" policy, or revise it to make clear that it does not prohibit employees in non–patient care areas from wearing pins, badges, and professional certifications that have not been approved by MHS.

(b) Rescind the overly broad provision of the "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy, or revise it to make clear that it does not prohibit employees in non–patient care areas from wearing badge reels that are not branded with MemorialCare approved logos or text.

(c) Notify all current employees that the overly broad provisions of the "Dress Code and Grooming Standards" and "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policies have been rescinded or, if they have been revised, provide them a copy of the revised rules.

(d) Within 14 days after service by the Region, post at its Long Beach, California facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 20, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part.

The Respondent is an acute-care hospital. Its principal concern is for the safety and well-being of its patients. To that end, in October 2014, it adopted an Appearance, Grooming and Infection Prevention Standards for Direct Care Providers Policy "to promote an efficient, orderly, safe and professionally operated organization while adhering to evidence-based best practice." At the beginning of the Policy, the Respondent explains that "[b]est-practice literature provides strong evidence for the attire of healthcare providers which may prevent hospital acquired infections" and "perception of patients regarding appearance and attire has been well established in the literature." It continues by noting that one of the purposes of the Policy is that "[p]atients may lack confidence and trust in individuals that are not easily identified as healthcare professionals" and "[p]romoting standard attire will assist patients in easily identifying their care providers and in promoting satisfaction." The Policy also states that "[d]ress, appearance and grooming play an important role in conveying an image of high quality, professional healthcare to the communities we serve and maintaining our excellent reputation." Thus, in accordance with the professional literature, the Respondent adopted the Policy to provide the best possible care for its patients.

Under the Policy, direct care providers must wear identification badges that can be readily seen while on hospital premises. If employees choose to use a badge reel, it "may only be branded with MemorialCare approved logos or text."[1] It is undisputed that the Re-

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" (PC-261.02).

spondent lawfully imposed this requirement in immediate patient care areas. Nonetheless, the General Counsel argues that the badge reel rule is unlawful because it "does not clearly state whether it is applicable to patient or non-patient care areas and any ambiguity in this regard should be construed against Respondent." The judge found this argument unpersuasive because, as discussed below, "employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas." My colleagues, however, reverse the judge and find the rule unlawful by broadly interpreting it to apply in all areas of the hospital. I respectfully disagree and would adopt the judge's finding that the mere maintenance of the badge reel rule does not interfere with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.[2]

The Board applies special rules when evaluating restrictions on union insignia in healthcare facilities due to concerns about the possibility of disruption to patient care. Although restrictions on wearing union insignia are presumptively invalid in non-patient care areas, restrictions on wearing union insignia in immediate patient care areas are presumptively valid. See *Casa San Miguel*, 320 NLRB 534, 540 (1995); see also *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979). In determining the scope of a disputed rule, the Board must consider it in its entirety without parsing its language or reading parts of it in isolation. Applying these principles, and considering the Respondent's badge reel rule in context, I believe that it was lawful.

First, as noted above, the title of the Policy in which the badge reel rule appears is "Appearance, Grooming and Infection Prevention Standards for *Direct Care Providers*" (emphasis added). I believe that, because the Policy is only directed towards "direct care providers," the badge reel rule would be understood to only apply in immediate patient care areas where direct care providers work. This conclusion about the rule's limited applicability to immediate patient care areas is reinforced by the Policy's stated scope. It applies to "all those who work in any capacity *in providing direct patient care*," even students, volunteers, and contractors, which demonstrates that it was promulgated not to restrict employees' rights but to protect its patients—all of whom are necessarily located in immediate patient care areas. Second, the Policy's stated purposes further demonstrate that the badge reel rule only applies in immediate patient care areas.[3] The Policy is to prevent the transmission of hospital-acquired infections and to promote patient trust and confidence by allowing them to readily identify their care providers. Achieving these objectives is only relevant in immediate patient care areas where patients are present and receive treatment.[4] Third, there is no evidence or contention that the badge reel rule has ever been applied to employees when they are not providing direct patient care.[5] The judge further found—and my colleagues do not dispute—that the General Counsel failed to establish that the Respondent disparately enforced the badge reel rule by only prohibiting badge reels with union logos.[6]

Fourth, even if the badge reel rule were applicable in non–patient care areas, I believe that it was justified by special circumstances. The Board has found special cir-

[2] I agree with my colleagues and the judge that the Respondent violated Sec. 8(a)(1) of the Act by maintaining that portion of Policy #318 that prohibits employees from wearing unapproved pins and badges. I also agree with my colleagues that it is unnecessary to pass on whether this policy provision would be lawful if it restricted only the attachment of pins and badges to employee identification badges.

[3] The Policy's Purpose section, in pertinent part, reads as follows:

> 1. The Professional Appearance and Grooming Policy is intended to establish appropriate appearance, grooming and infection control standards for those who are direct patient care providers at Community Hospital Long Beach, Long Beach Memorial, and Miller Children's and Women's Hospital Long Beach, including off-site clinics and satellite work locations. ...
>
> 2. BACKGROUND: The Medical Center is committed to the safest care of patients including the prevention AND transmission of pathogens. Best-practice literature provides strong evidence for the attire of healthcare providers which may prevent hospital acquired infections. This policy provides clear guidance on the best method to prevent contamination by attire and its potential contribution to hospital acquired infections.
>
> 3. Additionally, perception of patients regarding appearance and attire has been well established in the literature. Patients may lack confidence and trust in individuals that are not easily identified as health care professionals. Promoting standard attire will assist patients in easily identifying their care providers and in promoting satisfaction. Dress, appearance and grooming play an important role in conveying an image of high quality, professional health care to the communities we serve and maintaining our excellent reputation.

[4] My colleagues find that the badge reel rule is not limited to immediate patient care areas. In doing so, they fail to read the rule in its entirety. The rule applies only to direct patient care providers, including even nonemployees, and its stated purpose is to improve the quality of patient care. In my view, direct care providers would reasonably understand that the rule, which is solely concerned with their interactions with patients to improve patient care, does not apply in areas where there are no patients.

[5] In light of the rule's stated scope and purposes, it is understandable that the Respondent has limited its application to immediate patient care areas even though, as my colleagues observe, direct patient care providers necessarily move throughout the hospital and spend time in non–patient care areas.

[6] The judge properly found that unlawful disparate treatment is not established merely because enforcement may have sometimes been "soft and sporadic." See, e.g., *Stabilus, Inc.*, 355 NLRB 836, 840 (2010) (lax enforcement of a rule by some supervisors did not prove that an exacting supervisor's enforcement of the rule against union supporters was disparate treatment).

cumstances justifying the proscription of union slogans or apparel when their display "may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). Here, the Respondent has established that it promulgated the badge reel rule as part of a comprehensive set of clothing and identification requirements. Employees covered by the rule are required to wear standard uniforms that display the Respondent's embroidered logo on the upper left shoulder and the Respondent's logo on the badge reel on the upper right shoulder. As noted above, these standardized uniform rules prevent infections, insure that patients can readily identify their healthcare provider, and promote "an image of high quality, professional healthcare to the communities [the Respondent] serve[s]." I believe that this evidence is sufficient to show that allowing unofficial badge reels would unreasonably interfere with the Respondent's public image. See, e.g., *W San Diego*, 348 NLRB 372, 373 (2006); *United Parcel Service*, 195 NLRB 441, 441 (1972); see also *United Parcel Service v. NLRB*, 41 F.3d 1068, 1073 (6th Cir. 1994).[7]

For these reasons, I respectfully dissent from my colleagues' finding that the Respondent violated the Act by maintaining its badge reel rule.

Dated, Washington, D.C. April 20, 2018

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

[7] In finding that the Respondent did not establish special circumstances, my colleagues contrast this case with the facts in *W San Diego*, supra, where a hotel's restrictions on union insignia in public areas were found lawful based on evidence that the hotel sought to create a unique "Wonderland" atmosphere. However, I agree with the view of former Chairman Miscimarra that the Board is not empowered to pass judgment on the sophistication or novel nature of the public image that may be at issue in a particular case. See *In-N-Out Burger*, 365 NLRB No. 39, slip op. at 1 fn. 2 (2017) (separate views of Acting Chairman Miscimarra). In the *United Parcel Service* cases cited above, for example, the Board and the court upheld restrictions on the wearing of buttons and pins primarily based on the trademark brown uniforms worn by UPS employees. Similar considerations warrant upholding the restriction on badge reels at issue in this case.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an overly broad provision of our "Dress Code and Grooming Standards" policy that prohibits all employees, including employees in non–patient care areas, from wearing pins, badges, and professional certifications that have not been approved by MHS.

WE WILL NOT maintain an overly broad provision of our "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy that prohibits all employees, including employees in non–patient care areas, from wearing badge reels that are not branded with MemorialCare approved logos or text.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the overly broad provision of the "Dress Code and Grooming Standards" policy or revise it to make clear that it does not prohibit employees in non–patient care areas from wearing pins, badges, and professional certifications that have not been approved by MHS, and WE WILL notify all employees that the policy provision has been rescinded or revised.

WE WILL rescind the overly broad provision of the "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy or

revise it to make clear that it does not prohibit employees in non–patient care areas from wearing badge reels that are not branded with MemorialCare approved logos or text, and WE WILL notify all employees that the policy provision has been rescinded or revised.

LONG BEACH MEMORIAL MEDICAL CENTER, INC., D/B/A LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

The Board's decision can be found at www.nlrb.gov/case/21-CA-157007 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Lindsay Parker and *Molly Kagel, Esqs.*, for the General Counsel.
Adam Abrahms and *Kathleen Paterno, Esqs. (Epstein Becker & Green, P.C.)*, for Respondent.
Micah Berul, Esq., for Charging Party.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case challenges two employee dress code and appearance rules at Long Beach Memorial Medical Center and Miller Children's and Women's Hospital. The rules prohibit employees from wearing a nonapproved pin or badge reel. The General Counsel alleges that, on their face, the rules violate Section 8(a)(1) of the National Labor Relations Act because they are not expressly limited to immediate patient care areas and restrict the ability of employees to engage in protected conduct (wearing union pins and badge reels).

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act by disparately enforcing the badge reel rule. Specifically, the General Counsel alleges that Respondent prohibited two registered nurses, who served as union representatives in their medical units, from wearing a badge reel with the union logo in patient care areas, while permitting nurses to wear other badge reels in such areas that did not have the approved logo.

A hearing to address the allegations was held on May 23 and 24, 2016, in Los Angeles. The parties thereafter filed briefs on July 20. As discussed below, the General Counsel has adequately established that the pin rule is facially unlawful, but not that the badge reel rule is facially unlawful or has been disparately enforced.

I. FACTUAL BACKGROUND

Respondent is a large urban medical facility. It includes two licensed hospitals and employs about 6000 employees, including over 2100 registered nurses (RNs) represented by the California Nurses Association/National Nurses United (CNA/NNU).[1]

To help maintain safety and security at the facility, Respondent employs its own security force, including 70 security guards and three K-9 units. Since at least 2012, it has also required all staff to wear an "ID badge" visible at all times while on the job. The ID badge displays the employee's photo, name, and title and is coded electronically to allow the employee appropriate and necessary access to hospital and parking areas by swiping it across an electronic panel. Some badges also have a color-coded stripe across them; for example, RNs have a blue stripe, and employees authorized to remove infants and children from their room or unit have a pink stripe, across their ID badge. (R. Exh. 3; Tr. 109–110, 200–201.)[2]

Since March 2014, Respondent has also maintained a "dress code and grooming" policy for all employees who work at the facility, including but not limited to those who wear uniforms. The policy (#318), which is published on Respondent's intranet, was adopted and established by Memorial Health Services d/b/a MemorialCare Health System (MHS), Respondent's parent corporation. The policy sets forth standards of "appropriate dress, appearance, and grooming" to "promote an efficient, orderly and professionally operated organization" at all MHS facilities.

The policy also lists several "examples of minimum requirements." Consistent with the security policy, the first requirement is that all employees must wear their "identification badges" with the name and picture facing out, at a level that can be readily seen. Other requirements address such things as hair (no "extreme styles or colors" allowed), and earrings or other jewelry (must be "conservative," nondangling, and not "prove to be a distraction to others").

The last requirement (#9) is the subject pin rule, which states, "Only MHS approved pins, badges, and professional certifications may be worn." Under this rule, RNs are permitted to clip various small pins to the top of the badge, including years of service pins and "I Give" pins (indicating that they donate to the medical center) issued by Respondent, and certification pins issued by professional associations or organizations

[1] There is no dispute, and the record establishes, that the Board has jurisdiction.

[2] Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

indicating that they have been certified in a particular specialty (e.g., pediatric nursing). (GC Exhs. 3, 20–21; Tr. 38, 65–67, 127–131; 209–211, 265–266.)[3]

Since October 2014, Respondent has also maintained two new policies applicable only to employees who provide direct patient care at the facility. Both of these policies are likewise published on Respondent's intranet. The first is a "uniform and infection prevention" policy (PC–261.01), which establishes standards of attire to assist patients in easily identifying their care providers and to prevent hospital acquired infections. It requires direct care providers to wear a standard hospital uniform, color coded by discipline and embroidered with the approved logo and their discipline when on duty. Pursuant to this new policy, RNs who provide direct patient care may no longer wear scrubs of any color or pattern. Rather, they must wear navy blue scrubs provided by Respondent with the MHS name and logo (a medical cross in a circle design) and their discipline (RN) embroidered in white on the upper left side of the scrub top.

To help prevent infections, the policy also establishes a "bare below the elbows" rule. The rule prohibits RNs and other direct care providers from wearing such things as long-sleeved jackets or wristwatches in direct patient care areas. It also specifically prohibits them from wearing lanyards around their neck to attach and extend their ID badge for inspection or swiping. As a result, RNs must either attach the badge to a retractable badge reel or attach and detach the badge directly to and from their uniform. (GC Exh. 5; see also GC Exh.7; and Tr. 51, 78, 202–205, 233, 249.)

The second new policy applicable to direct patient care providers is an "appearance, grooming, and infection prevention" policy (PC–261.02). Like the new uniform and infection prevention policy, it establishes standards of appropriate appearance for those employees who provide direct patient care in order to assist patients in easily identifying them and to prevent hospital acquired infections. Indeed, it references and repeats portions of that policy. For example, it contains a similar "bare below the elbows" rule. It also sets forth numerous specific appearance and grooming requirements. For example, like the MHS policy, it states that "identification badges" shall be worn with the name and picture facing forward. It specifically adds, however, that the badges must be worn at collar level, on the right side, so they can be readily seen. Pursuant to this rule, the new RN uniform has a small piece of fabric sown onto the scrub top on the right side so that the badge reel or badge itself can be attached to it with a clip.

The policy also includes the subject badge reel rule (#12), which states, "Badge reels may only be branded with MemorialCare approved logos or text."[4] Pursuant to this rule, Respondent provided each RN and other direct care provider with a new badge reel displaying the same MHS medical-cross logo as the uniform. At least some received the new MHS badge reel with their new uniform order in November or December 2014. Others received it directly from their managers. Respondent also provided a replacement on request if the badge reel broke, which it often did. Indeed, Respondent had its vendor modify the construction of the badge reel twice in the first 6 months to make it more durable. (GC Exhs 6, 8; R. Exhs. 10–13; Tr. 85–86, 113, 148–149; 238–240, 294–298.)

Finally, all of the foregoing policies state that it is the responsibility of the supervisors to "consistently enforce compliance" with the standards and requirements by taking appropriate corrective or disciplinary action with employees who violate them.[5]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Alleged Unlawful Maintenance of the Pin and Badge Reel Rules

It is well established that, absent special circumstances, employees have a right under the Act to wear union insignia at work. However, due to concerns about disrupting patient care, the Board has adopted certain rules unique to healthcare facilities. In such facilities, a ban on wearing any nonofficial insignia in immediate patient care areas is presumptively valid.[6] However, restrictions on wearing insignia in other areas are presumptively invalid. A hospital or other healthcare facility must therefore establish special circumstances justifying such restrictions; specifically, that the restrictions are necessary to avoid disruption of healthcare operations or disturbance of patients. See *HealthBridge Management, LLC,* 360 NLRB 937 (2014), enfd. 798 F.3d 1059 (D.C. Cir. 2015); and *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577, 580 (9th Cir. 2008), and cases cited there.

Here, the General Counsel contends that Respondent's pin and badge reel rules on their face apply––or would reasonably be construed by employees to apply—even in non-direct patient care areas of the facility; that the rules are therefore presumptively invalid; and that Respondent has failed to establish special circumstances justifying the application of the rules to such areas.

1. The Pin Rule

As indicated above, the MHS dress code and grooming policy containing the pin rule applies to all employees, including non-direct patient care providers.[7] Thus, it is clear that the pin

[3] Policy #318 was modified in certain respects in July 2014; for example, a requirement was added stating that "clothing must cover the back, shoulders, thighs, midriff, and must not be excessively short, tight, or revealing" (GC Exh. 4.) However, the pin rule was retained without change.

[4] This is the only rule where badge reels are specifically addressed. There is no mention of badge reels in the MHS dress code and grooming policy or Respondent's uniform policy.

[5] The subject pin and badge reel rules were apparently adopted and implemented without the Union's agreement. See Tr. 308–310. There is no contention that the Union waived the RNs' right under the Act to wear union insignia in non-direct patient care areas. See generally *AT&T*, 362 NLRB No. 105, slip op. at 5 (2015).

[6] The presumption of validity applies only to a ban on all nonofficial insignia in immediate patient care areas; it does not apply to a selective ban on only union or certain union insignia. *St. Johns Health Center*, 357 NLRB 2078, 2076, 2079 & fn. 3 (2011).

[7] Judith Fix, Respondent's senior vice president of patient care services and chief nurse officer, testified that the MHS policy applies *only* to non-direct patient care providers, as that policy was superseded by Respondent's subsequent policies applicable to direct patient care providers (Tr. 217–218). However, she later testified that direct patient

rule is not limited to direct patient care areas of the facility. Accordingly, the rule is presumptively invalid, and Respondent must show that the restriction on any employees wearing nonapproved pins in non-direct patient care areas is necessary to avoid disruption of its operations or disturbance of patients.

Respondent has failed to make the required showing. Respondent argues that the ban on wearing nonapproved pins on ID badges in all areas is justified because ID badges are part of the hospital safety and security protocol (Br. 39–42, 46–47). However, there is no substantial evidence indicating that *pins* are part of the safety and security protocol. As indicated above, the pin rule is set forth exclusively in the MHS dress code and grooming policy. Cf. *Boch Honda,* 362 NLRB No. 83, slip op. at 3 (2015), enfd. --- F.3d ---, 2016 WL 3361733, at *14 (1st Cir. June 17, 2016) (rejecting employer's assertion that its ban on unofficial pins was necessary for safety purposes, as the ban was contained in the "dress code and personal hygiene policy," which did not include any statement linking it to safety). Further, employees are permitted under the rule to wear a variety of pins on their badge in addition to professional certifications, including "I Give" pins distributed by Respondent. Cf. *London Memorial Hospital*, 238 NLRB 704, 709 (1978) (rejecting hospital's contention that its ban on nonprofessional insignia was imperative for patient care, given that the hospital encouraged employees to wear "I Care" buttons). Finally, Judith Fix, who as noted above is Respondent's senior vice president of patient care services and chief nurse officer, acknowledged that there is no limit to how many pins employees can wear on their ID badge, as long as the badge remains readable (Tr. 267).[8]

In any event, the rule on its face is not limited to wearing nonapproved pins on ID badges. Respondent argues that "no reasonable employee would read, in the context of the whole, the challenged [rule] as restricting the wearing of pins anywhere except for on an employee's ID badge" (Br. 48). However, Respondent cites no provision in its dress code and grooming policy or other policies that would reasonably be interpreted by employees to narrow the otherwise broad restriction to only badge pins.

Respondent also argues that there is no explicit ban on wearing union insignia in the policy; thus, "when read in the context of the whole," the rule "would not make a reasonable employee think they were prohibited from wearing union insignia" (Br. 50). However, on its face, the ban on all nonapproved pins would include union pins. Cf. *Albertsons, Inc.,* 351 NLRB 254, 256–257 (2007) (employer's restriction on wearing badges or pins other than name badges on its face covered union badges and pins of all types and sizes). And, again, Respondent cites no specific provision that would reasonably be interpreted by employees to narrow the otherwise broad restriction to only nonapproved pins other than union pins.

Citing Fix's testimony, Respondent also argues that employees are not prohibited from displaying union insignia in other ways while working at the facility. Fix testified that Respondent does not prohibit non-direct patient care employees, who are not required to wear a standard uniform, from wearing other items, such as jackets, lanyards, earrings, and necklaces, that display union or other insignia. Indeed, she testified that even uniformed direct care providers may display the union logo on earrings and necklaces, and could also tattoo it on their forearm or paint it on their fingernails.[9] However, there is no evidence that Respondent has communicated this to employees (other than by not explicitly prohibiting it).[10] Nor is there any evidence that Respondent's employees have regularly or routinely displayed union or other logos in such a manner at the facility during the relevant period. To the extent Respondent's brief (pp. 21–22) suggests otherwise, it is incorrect.

In any event, Respondent's burden is not satisfied simply by showing that all possible alternatives to union pins are not likewise expressly banned. Rather, as indicated above, Respondent must show special circumstances justifying the ban on union pins. This is illustrated by the very cases Respondent cites. For example, in *Albis Plastics*, 335 NLRB 923 (2001), enfd. 67 Fed. Appx. 253 (5th Cir. 2003), the Board upheld the employer's ban on nonapproved helmet stickers because the employer had shown that union or other nonapproved stickers on the employees' helmets would pose a threat to safety. The same was true in *Standard Oil Co. of California*, 168 NLRB 153 (1967). Although in both cases employees were free to display union insignia elsewhere on their clothing, the Board did not rely on this as a basis for upholding the helmet sticker ban in *Albis*, and cited it only as an additional ("furthermore") reason for upholding the similar ban in *Standard Oil*.

Respondent also argues that there is no evidence that any employee was actually prohibited from wearing a union pin.[11] However, in the absence of special circumstances, requiring management preapproval is itself an unlawful interference with

care providers are still prohibited by the appearance policy from wearing nonapproved pins on their badge or when in uniform (Tr. 250–251, 265–266, 271). Further, she acknowledged that the source of that prohibition is the MHS policy (Tr. 276).

[8] The General Counsel argues that Respondent has also permitted employees, particularly those in the pediatric units, to wear pins with cartoon characters on their badge, such as Ariel the Mermaid, Mickey Mouse, and Bugs Bunny. In support, the General Counsel cites the testimony of RN/Union Representative Brandy Welch and former RN/Union Representative Theresa Stewart, who retired in January 2016 (Tr. 65, 74, 126). However, as indicated by Respondent, their testimony is too vague and insubstantial to establish that employees have worn such pins with any regularity or frequency, or that Respondent has permitted them to do so expressly or impliedly through lax enforcement of the pin rule.

[9] See Fix's testimony, Tr. 218, 261–263. The MHS and Respondent dress code, grooming, and appearance policies prohibit visible tattoos except for employees with direct patient care responsibilities who, for infection control purposes, are not allowed to wear any clothing below the elbows to cover such a tattoo. Thus, the written policies appear to prohibit employees in non-direct patient care areas from displaying a union tattoo on their forearm.

[10] As indicated above, the MHS dress code and grooming policy requires earrings and other accessories and jewelry to be "conservative" and not "distracting."

[11] There is no evidence that employees have worn union pins while working during the relevant period. RN Welch, who as noted above is a union representative and has worked at the facility for 18 years, testified that she had seen a union pin on an employee's ID badge; however, she was not sure when or if it was during the past 2 years (Tr. 73–74).

employee rights under the Act, as the requirement may chill employees from exercising those rights. See *Lily Transportation Corp.,* 362 NLRB No. 54, slip op. at 6 (2015); and *Middletown Hospital Assn.*, 282 NLRB 541, 552–553 (1986), and cases cited there. As discussed above, Respondent has failed to show special circumstances.

Finally, Respondent argues that there was no actual approval process for pins at the facility, citing Fix's testimony that "MHS approved pins" really means "MHS distributed pins" (Tr. 273). However, as Fix acknowledged, the rule does not say that. Nor is there a substantial evidentiary basis to conclude that employees would reasonably interpret the rule to mean that. In any event, even if they did, and therefore knew for certain that union pins could not be worn, the resulting chilling effect on their rights would be no less.

2. The Badge Reel Rule

As indicated above, unlike the MHS policy, Respondent's appearance, grooming, and infection prevention policy containing the badge reel rule is expressly limited to direct patient care providers. Nevertheless, the General Counsel argues that, like the pin rule, the badge reel rule is facially unlawful because it "does not clearly state whether it is applicable to patient or non-patient care areas and any ambiguity in this regard should be construed against Respondent" (Br. 24).[12]

The argument is unpersuasive. It is true that ambiguities in employee conduct rules are construed against the employer. See, e.g., *Valley Health System LLC*, 363 NLRB No. 178, slip op. at 1 (May 5, 2016); and *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). However, a rule is not ambiguous merely because it *could be* interpreted to apply to protected activity; the test is whether employees *would* reasonably interpret it to apply to such activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647–648 (2004).

Here, employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas. Respondent's appearance, grooming, and infection prevention policy clearly states that its purpose is to assist patients in easily identifying their direct patient care providers and to prevent hospital acquired infections. Further, although the badge reel rule does not itself reference patient care or patient care areas, some of the other provisions and rules do. See p. 1, purpose #4 (bare-below-elbows approach is intended to prevent infection in "patient care areas"), and p. 2, policy #4 (long hair must be tied back or pulled up "during care").

Moreover, the policy specifically provides (p. 2, policy #1) that employees who come into the hospital for education or meetings, rather than to provide patient care, may wear "business casual" attire instead of "MHS logo" attire. And there is no contention or evidence that the badge reel rule has ever been applied to employees when they are not providing direct patient care. Cf. *Mt. Clemens General Hospital,* 335 NLRB 48, 50–51 (2001), enfd. 328 F.3d 837 (6th Cir. 2003) (hospital's ban on a particular union button protesting forced overtime was overbroad because supervisors required RNs to remove the button at times when they were in non-patient care areas, such as nurses lounges).[13]

B. Alleged Disparate Enforcement of the Badge Reel Rule

Even if an employer's rule is facially lawful, the disparate enforcement of that rule against union or other protected concerted activity violates the Act. See, e.g., *Shelby Memorial Home*, 305 NLRB 910, 919 (1991), enfd. 1 F.3d 550, 565 (7th Cir. 1993) (nursing home's selective enforcement of its rule restricting pins or badges against union insignia but not other insignia was unlawful). See also *Stabilus, Inc.*, 355 NLRB 836, 839 (2010); and *Nestle Co.*, 248 NLRB 732, 737 (1980), affd. mem. 659 F.2d 252 (D.C. Cir. 1981). The General Counsel alleges that such disparate enforcement occurred here when Respondent refused to allow two RNs, Brandy Welch and Theresa Stewart, to continue wearing a union badge reel in July and October 2015, respectively. As discussed below, however, the evidence fails to adequately support this allegation as well.

As noted above, both Welch and Stewart were union representatives for their respective medical units during the relevant period. It is undisputed that, notwithstanding the new appearance policy, they both regularly wore a union badge reel during much or most of 2015 without incident. The union badge reel was identical in size, shape, and function to the MHS badge reel. The only significant difference was that the face displayed the union (CNA) logo rather than the MHS logo and was encased in red rather than white plastic. Welch testified that she began wearing the union badge reel in February 2015, after the first MHS badge reel she was given broke. Stewart testified that she began wearing the union badge reel well before the new rule, and resumed doing so shortly after the new rule when her first MHS badge reel likewise broke. Elizabeth Castillo, another RN/union representative who works in the diabetes medical surgical unit, [14] testified that she also wore a union

[12] The allegation that the badge reel rule is facially unlawful was added to the complaint on the first day of hearing, after Respondent's counsel cited it in his opening statement and the General Counsel's first witness, Respondent's HR Director and custodian of records, testified about it. The General Counsel explained the delay in alleging the violation on the ground that the Regional Office was previously unaware of the rule. Respondent disputed this, asserting that the rule was quoted in the position statement it filed during the Region's investigation of the Union's charge, and therefore objected to adding the allegation. Respondent renews this objection in its posthearing brief (p. 30 fn. 30), and requests that the allegation be stricken. The request is denied, essentially for the same reasons that the General Counsel's amendment was granted (Tr. 47–48). Even if Respondent had informed the General Counsel of the badge reel rule during the investigation of the other allegations, the allegation that the rule is facially unlawful is closely related to the complaint allegation that Respondent disparately required RNs to remove the union badge reel; the new allegation was added early in the hearing during the General Counsel's case in chief; and Respondent does not assert that it was denied sufficient time to prepare its defense or otherwise suffered any prejudice.

[13] As discussed infra, RN Welch was just outside the patient care area when she was told to remove her union badge reel. However, she was on her way into that area. See Tr. 58, 304, and GC Br. 17. And the General Counsel does not cite this incident as evidence that the badge reel rule was applied outside immediate patient care areas.

[14] There are about 50 union representatives at Respondent's facility (Tr. 315–316). There is no record evidence whether the other 47 likewise wore union badge reels or were told to remove them.

badge reel throughout most of 2015. (Tr. 54–55, 75–76, 85, 88, 115, 170–171; GC Exh. 10.)

Eventually, in July 2015, Welch was told by the clinical director of her pediatric unit, Colleen Coonan, that she could no longer wear the union badge reel. Welch had been talking with Coonan and another manager just outside the pediatric unit door about a grievance matter. As Welch was leaving the conversation to enter the unit, Coonan told her that she could not wear the badge reel, she had to wear the MHS badge reel. (Tr. 58, 304.) About 3 months later, in October 2015, Stewart was likewise told to remove her union badge reel by one of the two assistant unit managers in her outpatient surgery unit, Robin Johnson. Stewart was caring for a patient when Johnson entered the room, gave her an MHS badge reel, and told her she needed to wear it under the new policy. About 2 months later, in December 2015, Castillo was also told by a manager that she had to wear the MHS badge reel.[15] (Tr. 115–117, 149, 170–171, 283–284.)[16]

The parties presented conflicting testimony regarding whether RNs and other direct care providers were allowed to continue wearing other types of non-MHS badge reels during the relevant period. For example, Fix, who is responsible for all patient care, testified that the MHS badge reel is considered part of the standard uniform and that no other type of badge reel is permitted. Further, she testified that she has never seen anyone wearing a non-MHS badge reel, even though she frequently observes and interacts with the staff during her multiple daily rounds in the patient care units and has seen other violations such as clothing below the elbows. (Tr. 233, 239, 247–248, 264).

Coonan likewise testified that the MHS badge reel is part of the uniform. She testified that she told the staff in her unit this at the time the new rule was implemented, and that she thereafter reminded anyone she saw who was not wearing the MHS badge reel. She testified that, other than Welch, she has had to remind only about four employees of the rule, whom she observed during daily "huddles" between June and September 2015 wearing a badge reel with Hello Kitty, a frog, or a princess on it. (Tr. 295, 299–305.)

Johnson similarly testified that she looked for anyone without an MHS badge reel, because the hospital director told the assistant unit managers to distribute the MHS badge reels in accordance with the policy. She testified that, in addition to Stewart, she saw only one other RN without the MHS badge reel, and that she gave her one too. Moreover, she testified that she did not even notice what kind of badge reels they were wearing, only that they were not the MHS badge reel. (Tr. 284–285.)

The General Counsel's witnesses, on the other hand, painted a distinctly different picture. Welch testified that she was unaware until the July 2015 incident with Coonan that only the MHS badge reel was allowed. Further, she testified that both before and after that incident she saw other RNs wearing badge reels with cartoon characters (Ariel the Mermaid, Spiderman, Sponge Bob, Mickey Mouse, and Batman), badge reels decorated with jewelry, and badge reels with logos for breast cancer research and organ donation (One Legacy). She testified that she saw RNs wearing such badge reels daily, including on the patient care floor, and was not aware of any manager asking that they be removed. (Tr. 58–59, 60, 64, 76, 95–96.) She also submitted a photograph she took in July 2015 (the same day as the incident with Coonan) of another RN working on her unit who was wearing a One Legacy badge reel (GC Exh. 13).[17]

Similarly, Stewart testified that she had never been instructed to wear the MHS badge reel prior to the October 2015 incident with Johnson; that it was merely recommended to be worn. She further testified that, after the incident until her retirement in January 2016, she saw nurses wearing "I Give" badge reels, badge reels with logos for the Oncologic Nurse Society (ONS), Vascular Access Certification (VAC), and Care Ambulance (an ambulance service used by the hospital), badge reels with decorative flowers (made out of the plastic safety tops of vials), and badge reels with nothing at all on them. Like Welch, she testified that she did not see any nurses being told to remove such badge reels. (Tr. 118–125.) She also submitted three photographs she took during that period. See GC Exh. 16 (close up of a VAC badge reel on an RN's uniform); GC Exh. 18 (close up of a plain black badge reel on an RN's uniform); and GC Exh. 19 (close up of an "I Give" badge reel on an RN's uniform).[18]

Castillo testified that she has also seen RNs wearing other badge reels notwithstanding the new policy. Like Welch and Stewart, she testified that she has seen One Legacy badge reels, badge reels with cartoon characters, and badge reals that say nothing at all. She has also seen badge reels covered in rhinestones, and badge reels that say PACU (one of the units in the hospital). She testified that she has seen RNs wearing such badge reels on the patient care floor, even during the past 6 months, and that no one to her knowledge said they had to be removed. (Tr. 162–164, 180.) She also submitted a photo she took on her unit floor in May 2016. See GC Exh. 23 (RN badge attached to a heart-shaped badge reel covered with rhinestones).

None of the foregoing testimony, by either the Respondent's or the General Counsel's witnesses, was particularly credible or persuasive. For example, it seems highly unlikely, based on the record as a whole (including the undisputed fact that the MHS badge reels frequently broke), that Fix has never noticed any RNs or other direct care providers wearing a non-MHS badge reel, and that Johnson has seen only one RN in addition to Stewart wearing a non-MHS badge reel. There is also reason to doubt Johnson's testimony that she did not notice or know what type of badge reel Stewart was wearing. As discussed above,

[15] Unlike the July and October incidents involving Welch and Stewart, this December incident involving Castillo is not alleged as a violation in the complaint.

[16] Coonan and Johnson are admitted supervisors of Respondent.

[17] Welch also submitted a photo she took the same day of an RN wearing a badge reel with Ariel the Mermaid on it. However, the RN was not in uniform or working in a direct patient care area at the time. (GC Exh. 12; Tr. 61, 94–95).

[18] The three photos do not show the RN's face or badge and Stewart did not otherwise identify them.

Stewart was a union representative and had been wearing the CNA badge reel for months.

However, there is also substantial reason to discount the testimony of Welch, Stewart, and Castillo. As indicated above, Respondent employs thousands of RNs and other direct care providers. Yet, not one confirmed personally wearing a cartoon-character or other type of non-MHS badge reel during the relevant period (none were called or subpoenaed to testify). Further, between the three of them, Welch, Stewart, and Castillo could offer only five photographs purporting to show an RN wearing a non-MHS badge reel in a patient care area. No explanation for this was given and none is obvious. According to their testimony, their fellow RNs are unafraid to openly wear nonapproved badge reels in front of their supervisors on a daily basis. And it is undisputed that Respondent has never actually disciplined an RN or other direct patient care provider for violating the badge reel rule or any of the other new uniform and appearance rules.

Moreover, as discussed above, Welch, Stewart, and Castillo admitted that Respondent did not tell them to remove their union badge reels until approximately 6, 9, and 11 months, respectively, after they began wearing them. On its face, this seems inconsistent with the theory that Respondent more strictly enforced the rule against union badge reels. Cf. *University of Richmond*, 274 NLRB 1204, 1210 (1985) (finding no disparate enforcement in part because a union supporter was asked to remove her union button only twice even though she wore it throughout the organizing campaign); and *Hanes Hosiery, Inc.*, 219 NLRB 338, 346–347 (1975) (finding no disparate enforcement in part because the employer did not prohibit all of the employees from wearing union buttons). And neither the General Counsel nor the Union offers a rationale for disregarding it.

All things considered, therefore, the truth is likely in the middle: some, but not many, of the RNs and other direct patient care providers have worn non-MHS badge reels at various times since the new rule became effective, and Respondent's enforcement of the new rule has been soft and sporadic, but not selective against union badge reels. Accordingly, as this falls short of a disparate-enforcement violation, the General Counsel has failed to carry the burden of proof.[19]

CONCLUSIONS OF LAW

1. Respondent has violated Sections 8(a)(1) and 2(6) and (7) of the Act by maintaining a rule, set forth in the MemorialCare Health System (MHS) dress code and grooming policy applicable to all employees, including employees in non-direct patient care areas, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

2. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

The appropriate remedy for the violation found is an order requiring Respondent to cease and desist from its unlawful conduct and to take certain affirmative action. Specifically, Respondent will be required to rescind the unlawful MHS rule at its facility and to advise the employees that it has done so.[20] Respondent will also be required to post a notice to employees assuring them that it will not violate their rights in the same or any like or related manner in the future.

ORDER

The Respondent, Long Beach Memorial Medical Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach, its officers, agents, succesors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule at its facility that prohibits all employees, including employees in non-direct patient care areas, from wearing any pins, badges, and professional certifications that have not been approved by MemorialCare Health System (MHS).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule at its facility, set forth in the MHS dress code and grooming policy applicable to all employees, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

(b) Publish on its intranet and distribute to all of its current employees a revised policy that does not contain the unlawful rule or that contains a lawfully worded rule.

(c) Within 14 days after service by the Region, post at its facility in Long Beach, California copies of the attached notice marked "Appendix".[21] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates

[19] The two cases cited in the General Counsel's and the Union's posthearing briefs—*Raley's Inc.*, 311 NLRB 1244, 1245 (1993) and *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1047 (1994)—are factually distinguishable for the reasons indicated above. They also lack any precedential weight, as no exceptions were filed in either case to the relevant ALJ findings regarding disparate enforcement. See generally *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel)*, 357 NLRB 1683 fn. 1 (2011); and *Trump Marina Associates LLC*, 354 NLRB 1027 fn. 2 (2009), reaffd. 355 NLRB 585 (2010), enfd. 435 Fed.Appx. 1 (D.C. Cir. 2011).

[20] The complaint does not name MHS as a party respondent and neither the General Counsel nor the Union request an order requiring MHS to rescind the rule set forth in its policy or to take any other affirmative action at its other facilities.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. [22]

Dated, Washington, D.C., August 31, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule at our facility that prohibits all of our employees, including employees in non-direct patient care areas, from wearing any pins, badges, and professional certifications that have not been approved by MemorialCare Health System (MHS).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rule at our facility, set forth in the MHS dress code and grooming policy applicable to all employees, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

WE WILL publish on our intranet and distribute to all current employees a revised policy that does not contain the unlawful rule or that contains a lawfully worded rule.

LONG BEACH MEMORIAL MEDICAL CENTER, INC., D/B/A LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-157007 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I hereby certify that on May 9, 2018, true and correct copies of the above and foregoing *Petition for Review* and *Corporate Disclosure Statement* were served by UPS overnight delivery, postage prepaid, on the following:

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Gary Shinners, Executive Secretary
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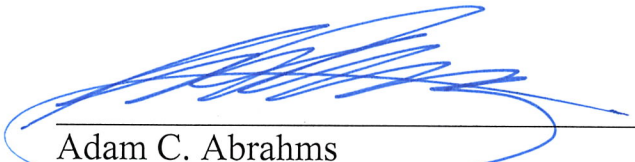
DATED: May 9, 2018



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